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& BALINT, P.C.**

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19     **IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

20     PAIGE PETKEVICIUS, on Behalf of  
21     Herself and All Others Similarly Situated,

22     Plaintiff,

23     vs.

24     NBTY, Inc., a Delaware Corporation;  
25     NATURE'S BOUNTY, INC. a New York  
26     Corporation; REXALL SUNDOWN, INC.  
27     a Florida Corporation and Does 1-100,

28     Defendants.

29     TATIANA KOROLSHTEYN, on behalf  
30     of herself and all others similarly  
31     situated,

32     Plaintiff,

33     vs.  
34     COSTCO WHOLESALE  
35     CORPORATION and NBTY, INC.,

36     Defendants.

37     Case No.: 3:14-CV-02616-CAB-RBB  
38     Case No.: 3:15-CV-00709-CAB-RBB

39     **PLAINTIFFS' REPLY IN SUPPORT  
OF MOTION TO STRIKE  
DECLARATION OF DR. SUSAN  
MITMESSER IN OPPOSITION TO  
PLAINTIFFS' MOTIONS FOR  
CLASS CERTIFICATION**

40     Date: TBD

41     Time: TBD

42     Judge: Hon. Cathy A. Bencivengo

43     Ctrm: 4C

44     **PER CHAMBERS' RULES, NO  
ORAL ARGUMENT UNLESS  
SEPARATELY ORDERED BY  
THE COURT**

1     **I. INTRODUCTION**

2         NBTY Senior Director of Nutrition and Scientific Affairs Dr. Susan Mitmesser  
 3 claims to be “ultimately responsible for the statements on the labels of the Ginkgo  
 4 Biloba products manufactured by NBTY,” including those at issue in this litigation.  
 5 (Mitmesser Decl., ¶3.) Defendants identified Dr. Mitmesser in response to a 30(b)(6)  
 6 deposition notice, proffering her to testify “regarding the scientific and/or medical  
 7 literature . . . which constitutes the basis for the claims made in [Defendants’]  
 8 advertisements concerning the Ginkgo biloba products,” including “whether Ginkgo  
 9 biloba and the Ginkgo biloba products provide the health benefit claimed by  
 10 [Defendants].” (Supp. Syverson Decl. Ex. A, Mitmesser Dep., 63:2-64:4.)  
 11 Approximately two months after her deposition concluded, and one month after the  
 12 deadline for disclosure of class certification experts, Dr. Mitmesser submitted an  
 13 expert declaration purporting to provide “substantiation of every claim made on our  
 14 product labels and the functionality of the product’s ingredients,” based on her review  
 15 of 18 studies that Defendants maintain in their “confidential ‘Structure Function  
 16 Files.’”<sup>1</sup> (Mitmesser Decl., ¶4.) Therein, she concludes that “[i]n my professional  
 17 opinion,” each study “provides evidence” that Ginkgo promotes “increased blood  
 18 flow,” that it can help “support healthy brain function,” and that it has “positive  
 19 effects on” and/or “can help support” memory and cognitive function. (*Id.* at ¶¶ 7(a)-  
 20 (r).)

21         Despite the fact that Dr. Mitmesser repeatedly and explicitly renders  
 22 “professional opinions” formulated through: (a) application of her specialized  
 23 knowledge and training in nutrition and biochemistry; and (b) her purported review of  
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25         <sup>1</sup> In their opening submission, Plaintiffs noted that Defendants previously produced  
 26 only 16 of the 18 studies Dr. Mitmesser cited in her declaration. It was ultimately  
 27 discovered that the other two had been produced, but that fact is not dispositive given  
 28 that Dr. Mitmesser limited her 30(b)(6) deposition testimony to 16 studies.

1 the “totality of the science” (i.e., the studies referenced above),<sup>2</sup> Defendants failed to  
 2 identify her as an expert, and refused to provide even the most cursory description of  
 3 her opinions. This mandates exclusion of Dr. Mitmesser’s declaration and testimony  
 4 (and of the studies) because: (1) testimony with respect to issues that are “beyond the  
 5 ken of the average juror” constitutes expert testimony that must be disclosed in  
 6 accordance with the mandates of Rule 26;<sup>3</sup> (2) the effects a particular compound may  
 7 have “on the human brain” is universally recognized to be a topic “well ‘beyond the  
 8 ken of the typical juror;’”<sup>4</sup> and (3) the failure to properly disclose Dr. Mitmesser’s  
 9 opinions was not harmless.

## 10 **II. ARGUMENT**

### 11       **A. TESTIMONY AS TO THE EFFECTS A PARTICULAR 12           COMPOUND MAY HAVE ON THE BRAIN IS, BY 13           DEFINITION, EXPERT TESTIMONY.<sup>5</sup>**

14       While Defendants tout Dr. Mitmesser’s “specialized knowledge given her  
 15 educational background (Ph.D. in Nutrition Sciences),” they inaccurately imply she  
 16 did not utilize any of it in proffering her declaration, insisting that she “was merely  
 17 testifying as to what *Defendants* relied on (and currently rely on) as support for their  
 18 ginkgo labels, which she is aware of as part of her job.” (Def. Opp. at 4 (italics in  
 19 original.) This is false. Dr. Mitmesser did not simply answer the question of what  
 20 information Defendants relied upon, she also tried to explain why they did so. While  
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23       <sup>2</sup> (Mitmesser Dep., 233:12-13.)

24       <sup>3</sup> *United States v. Plunk*, 153 F.3d 1011, 1017 (9th Cir. 1998).

25       <sup>4</sup> *Bell v. Miller*, 500 F.3d 149, 156 (2d Cir. 2007).

26       <sup>5</sup> Defendants seem to concede this fact, having now identified Dr. Mitmesser as an  
 27 expert who wishes to testify “as to the bases for Defendants’ substantiation of the  
 28 claims made on the product labels” in the merits phase of this class action litigation.  
 (See Supp. Syverson Decl. Ex. B, Def. Notice of Desig. Of Expert Witnesses for  
 Purposes of Summ. Judg. and Trial at 2-3.)

1 testimony as to the former (the “what”) can arguably be described as factual,<sup>6</sup>  
 2 “professional opinions” as to the latter (the “why”) require application of scientific,  
 3 technical, or other specialized knowledge, and therefore patently cannot. Furthermore,  
 4 all of this was covered in her 30(b)(6) deposition, and to the extent her declaration  
 5 differs from that testimony it should be stricken (and if it does not differ, it is subject  
 6 to exclusion as cumulative).

7 As noted above, in formulating her declaration Dr. Mitmesser reviewed a  
 8 number of peer-reviewed articles, ultimately concluding that each “provides evidence”  
 9 that Defendants’ Ginkgo biloba products: (a) promote “increased blood flow;” (b)  
 10 “support healthy brain function;” and/or (c) have “positive effects on” or “help  
 11 support” memory and cognitive function. (Mitmesser Decl., at ¶¶ 7(a)-(r).) Given the  
 12 foregoing, she opines that, in her “professional opinion,” each study provides  
 13 “substantiation of every claim made on [Defendants’] product labels and the  
 14 functionality of the products ingredients,” including “the active ingredients in the  
 15 Gingko Products.” (*Id.* at ¶¶4, 7(a)-(r).)

16 While Defendants insist they “considered Mitmesser to be a percipient, not  
 17 expert witness,”<sup>7</sup> they fail to cite any case in which a court has found opinion  
 18 testimony regarding the purported effects of a nutritional supplement (or any other  
 19 compound) on blood flow or brain function to fall outside the ambit of expert  
 20 testimony. That failure is not surprising given the fact that courts across the country –  
 21 including the California federal district courts – have held to the contrary. *See, e.g.*,  
 22 *Miller v. Terhune*, 510 F. Supp. 2d 486, 504 (E.D. Cal. 2007) (holding that “expert  
 23 testimony was needed to explain the effects of alcohol on the brain”); *Commonwealth v.*

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1     *Lloyd*, 702 N.E.2d 395, 397 (Mass Ct. App. 1998) (expert testimony required “to  
 2 explain the alleged effects of Prozac on a person’s ability to perceive or remember”).

3         And nothing in *F.D.S. Marine v. Brix Mar. Co.* – the lone case Defendants cite in  
 4 their brief – compels a different result. In that case, a billing dispute arose over certain  
 5 repair/salvage services that F.D.S. provided to one of its customers. In the course of  
 6 discovery, F.D.S. identified one of its owners, Cherie Stambaugh, as a potential fact  
 7 witness who “had knowledge of salvage and invoice issues.” 211 F.R.D. 396, at 401  
 8 (D. Or. 2001). Later, F.D.S. amended its discovery responses to list Stambaugh as an  
 9 expert, and the defendant moved to exclude her testimony, arguing the disclosure was  
 10 untimely. *Id.* The court held that Stambaugh was not an expert witness for purposes  
 11 of that case given her status as an F.D.S. employee and her personal involvement in  
 12 preparing the invoice that formed the basis of the dispute. *Id.* Accordingly, it  
 13 permitted her to testify as a fact witness “as to why that billing was reasonable based  
 14 upon her personal knowledge and experience.” *Id.*

15         Unlike the employee-witness in *F.D.S. Marine*, Dr. Mitmesser had no “personal  
 16 involvement” in determining whether the studies she cites supported Defendants’  
 17 label claims at the time they were made. Indeed, she conceded that the health claims  
 18 advanced on Defendants’ labels “have been in our database for years,” going back “as  
 19 far as 2009 or ten,” which predates her tenure with NBTY. (Mitmesser Dep., 21:10-  
 20 15, 64:11-66:11.) Moreover, she admitted that the first time she actually read any of  
 21 the studies was near the end of 2015, after Plaintiffs commenced these lawsuits. (*Id.* at  
 22 24:3-25:12, 69:11-70:24).<sup>8</sup> Given those critical differences, Defendants’ reliance on  
 23 *F.D.S. Marine* is misplaced.

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24  
 25         <sup>8</sup> Defendants cite testimony they claim confirms Dr. Mitmesser reviewed the studies  
 26 in question before this litigation. (*See* Def. Opp. at 9.) However, Dr. Mitmesser  
 27 explained that her team examined the “claims” on the packaging, not the studies.  
 28             (Mitmesser Dep. 191:23-193:20.) The only study she read at that time was the NTP,  
                    which is not among those cited in her declaration. (*Id.*)

1           **B. DEFENDANTS FAILED TO SATISFY THE RULE 26(a)(2)  
2 EXPERT DISCLOSURE REQUIREMENTS WITH RESPECT  
3 TO DR. MITMESSER.**

4           **1. Dr. Mitmesser was required to submit a written report.**

5         Unable to credibly dispute that Dr. Mitmesser's testimony implicates issues  
6 requiring expert analysis, or that she actually engaged in such analysis, Defendants are  
7 relegated to arguing that she was not required to provide an expert report. In this  
8 regard, Defendants contend that she was not "retained or specially employed to  
9 provide expert testimony," and that she is not someone "whose duties as the party's  
10 employee regularly involve giving expert testimony." (Def. Memo at 5, citing Fed. R.  
11 Civ. P. 26(a)(B)(2).) Neither contention has merit.

12         First, although not explicitly stated, it appears that Defendants believe Dr.  
13 Mitmesser's status as an NBTY employee, in and of itself, precludes application of the  
14 Rule 26 report requirement. Not so. The "dispositive question" with respect to the  
15 report requirement is not simply whether a particular witness is an employee, but  
16 rather "whether [her] opinion was developed . . . for purposes of litigation" or was  
17 formulated "as part of [her] duties as the party's employee." *Burreson v. Basf Corp.*, No.  
18 2:13-cv-0066 TLN AC, 2014 U.S. Dist. LEXIS 117590, at \*12 (E.D. Cal. Aug. 22,  
19 2014); *see also Patel v. Gayes*, 984 F.2d 214, 218 (7th Cir. 1993) (explaining that "Rule 26  
20 focuses not on the status of the witness but rather on the substance of the  
21 testimony"); *Prieto v. Malgor*, 361 F.3d 1313, 1381 (11th Cir. 2004) (applying Rule 26  
22 report requirement to employee-witness who "merely reviewed" reports and  
23 depositions, and who "had no connection to the specific events underlying this case  
24 apart from his preparation for this trial"); *Day v. Conrail*, No. 95 Civ. 968 (PKL), 1996  
25 U.S. Dist. LEXIS 6596, at \*7 (S.D.N.Y. May 15, 1996) (noting that the witness,  
26 "although employed by the defendant, is being called solely or principally to offer  
27 expert testimony," and concluding "there is little justification for construing the rules  
28

1 as excusing the report requirement").

2 As noted above, Dr. Mitmesser acknowledged that she did not work for  
 3 Defendants when they initially determined the subject studies support their label  
 4 claims, and she further confirmed that she did not review any of those studies until  
 5 after the plaintiffs filed suit. This constitutes an admission: (a) that she has no  
 6 connection to the specific events underlying this case apart from providing testimony  
 7 to defend against Plaintiffs' claims; (b) that her opinions were developed specifically  
 8 for that purpose; and (c) that although employed by Defendants, is being called  
 9 "solely or principally" to offer expert testimony. Accordingly, she is subject to the  
 10 Rule 26 report requirement, which she admittedly failed to satisfy.

11 Second, during the short time she has worked for NBTY (four years), Dr.  
 12 Mitmesser has already been called upon to provide testimony three or four times.  
 13 (Mitmesser Dep., 14:21-25, 21:11-23.) Thus, her duties as an NBTY employee do  
 14 indeed "regularly involve giving expert testimony" within the meaning of Rule  
 15 26(a)(2)(B). Defendants contend otherwise, of course, but the cases they cite are once  
 16 again easily distinguishable and entirely unpersuasive. *See United States v. Adam Bros.*  
 17 *Farming, Inc.*, No. CV-00-7409 CAS (RNBx), 2005 U.S. Dist. LEXIS 45938, at \*16-17  
 18 (C.D. Cal. Jan 25, 2005) (Rule 26 report requirement did not apply to employee-  
 19 witness who worked for the EPA "for nearly 20 years," during which time he had  
 20 testified "in two other cases"); *Navajo Nation v. Norris*, 189 F.R.D. 610, 612-13 (E.D.  
 21 Wash. 1999) (refusing to strike employee-witnesses for failure to provide Rule 26  
 22 reports where there was no evidence they had previously provided expert testimony,  
 23 and where it was thus "uncontradicted" that none of them "have been regularly used  
 24 by [plaintiff] as expert witnesses").

25 As noted above, Dr. Mitmesser testifies approximately once a year – not once  
 26 every ten years, or not ever, like the witnesses in the cases Defendants cite. Given that  
 27 dispositive difference, Defendants' reliance on those cases is misplaced.

1           **2. Even if Dr. Mitmesser were not subject to the Rule 26 report  
2 requirement, Defendants' disclosure is insufficient.**

3           Even if an expert witness is not required to provide a written report, the  
4 proffering party must still provide a disclosure that “include[s] both a statement of the  
5 subject matter on which the expert is expected to offer an opinion and ‘a summary of  
6 facts and opinions to which the witness is expected to testify.’”<sup>9</sup> *Burreson*, 2014 U.S.  
7 Dist. LEXIS 117590, at \*13 (quoting Fed. R. Civ. P. 26(a)(2)(C) (emphasis in  
8 original).) While Rule 26(a)(2)(C) does not demand “undue detail,” it does require  
9 “some detail.” *Kraja v. Bellagio, LLC*, No. 2:15-cv-01983-APG-NJK, 2016 U.S. Dist.  
10 LEXIS 54187, at \*5 (D. Nev. Apr. 22, 2016). Thus, disclosures that are conclusory,  
11 “lacking factual content,” or otherwise fail to identify the witness’ actual opinions are  
12 insufficient. *Id.*

13           Illustrative of the foregoing principles is *Burreson v. Basf Corp.*, which involved  
14 claims of damage to blueberry crops caused by application of a BASF fungicide.  
15 During the course of discovery, the plaintiff identified a number of non-retained  
16 expert witnesses, including Gregory Willems and Tom Avinelis, two farmers allegedly  
17 affected by the defective fungicide. *Burreson*, 2014 U.S. Dist. LEXIS 117590, at \*2.  
18 The disclosures with respect to each were as follows:

19           Gregory Willems will testify on the proper method of planting  
20 blueberries, and the care of them, and what reasonable production  
21 should have been on the blueberry fields of Plaintiff.

22           \*\*\*

23           Mr. Avinelis will testify on the proper care and cultivation of blueberry  
24 bushes, in California and Oregon, the Plaintiff’s method of farming of  
25 blueberries, and offer an opinion on what the reasonable expected  
26 production of blueberries from those field should have been, and what  
27 the net profit should have been.

28  
29           <sup>9</sup> Of significance, “[b]oth the Rule 26(a)(2)(B) written report and the Rule  
30 26(a)(2)(C) disclosure ‘share the goal of increasing efficiency and reducing unfair  
31 surprise.’” *Burreson*, 2014 U.S. Dist. LEXIS 117590, at \*8 (citation omitted).

1 *Id.* at \*10-11.

2 BASF filed a motion to strike, which the court granted, concluding that the  
 3 foregoing disclosures failed to satisfy even the “lesser disclosure requirement” of Rule  
 4 26(a)(2)(C). *Id.* at \*12. Specifically, they were improperly “limited to descriptions of  
 5 the subject matter,” and “[t]hey do not include a summary of the witness’ opinions”  
 6 (i.e., they “do not set forth either witness’s opinion of the best way to plant  
 7 blueberries, what plaintiff’s fields should have produced, or what plaintiff’s profits  
 8 should have been”). *Id.* at \*13. Because “the disclosures are deficient,” the court  
 9 precluded Messrs. Willems and Avinelis from testifying. *Id.*

10 In this case, the entirety of Defendants’ disclosure with respect to Dr.  
 11 Mitmesser is found in their initial Rule 26(a) disclosures,<sup>10</sup> where they identified her as  
 12 an individual “likely to have discoverable information” as to “NBTY’s support for  
 13 product claims; efficacy of Ginkgo Biloba.” Like those held to be deficient in *Burreson*,  
 14 Defendants’ disclosure here does nothing more than identify (and then just barely) the  
 15 subject matter of Dr. Mitmesser’s knowledge while omitting “a summary of the facts  
 16 and opinions to which the witness is expected to testify.” Absent that summary,  
 17 Defendants’ disclosure is per se deficient.<sup>11</sup>

18 **C. DEFENDANTS FAILURE TO COMPLY WITH THE RULE 26  
 19 DISCLOSURE REQUIREMENTS WAS NOT HARMLESS.**

20 The parties were required to disclose class certification experts by November  
 21 15, 2016, and fact discovery closed on December 13. On December 16, after both  
 22 deadlines had expired, Defendants produced Dr. Mitmesser’s declaration and  
 23 corresponding expert opinions. This indisputable violation of the scheduling order is,

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24  
 25 <sup>10</sup> Previously submitted with Plaintiffs’ opening brief as Exhibit A to the Declaration  
 26 of Patricia N. Syverson.

27 <sup>11</sup> Defendants do not respond to Plaintiffs’ contention that Dr. Mitmesser is subject  
 28 to the Rule 26(a)(2)(C) disclosure requirement, thus conceding the point. (*See* Def.  
 Opp. Part B; Plfs’ Mem. at 6-8.)

1 in and of itself, a sufficient basis to strike the declaration, as Defendants would  
 2 presumably agree, having previously (and successfully) argued:

3 A scheduling order is not a frivolous piece of paper, idly entered, which  
 4 can be cavalierly disregarded by counsel without peril. . . Disregard of  
 5 the order would undermine the Court's ability to control its docket,  
 6 disrupt the agreed-upon course of litigation, and reward the indolent  
 7 and cavalier.

8 (Def. Opp. to Motion to Modify Scheduling Order (ECF No. 102) at 1 (quoting  
 9 *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992).))

10 But even if the Court were to ignore Defendants' own words, exclusion would  
 11 remain appropriate under Rule 37(c)(1), which provides that if a party fails to properly  
 12 identify an expert, that party "is not allowed to use that information or witness to  
 13 supply evidence on a motion, at a hearing, or at a trial, unless the failure was  
 14 substantially justified or harmless."<sup>12</sup> "The burden to prove harmlessness," of course,  
 15 "is on the party seeking to avoid Rule 37's exclusionary sanction." *Goldman v. Staples*  
 16 *the Office Superstore, LLC*, 644 F.3d 817, 827 (9th Cir. 2011).

17 Defendants insist they have satisfied their burden, arguing that Plaintiffs have  
 18 not been prejudiced because they deposed Dr. Mitmesser with respect to the studies,  
 19 and because "they could have easily requested a further deposition" if they were  
 20 unsatisfied, but have "chosen not to do so." (Def. Memo. at 15.) In their opening  
 21 submission, Plaintiffs explained at length the various forms of prejudice they have  
 22 suffered as a result of Defendants inexcusably dilatory discovery conduct. (See Memo  
 23 in Supp. of Mot. to Strike Mitmesser Decl. at 9-19.) Given that fulsome exposition, it  
 24 is sufficient for purposes of this reply to note that courts have found prejudice to exist  
 25 where the offending party's conduct resulted in otherwise unnecessary motion  
 26 practice and/or delayed the progression of the case.

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27 <sup>12</sup> Defendants do not argue that their failure to properly identify Dr. Mitmesser was  
 28 justified, just that it was harmless.

1       In *Kraja v. Bellagio*, for example, the plaintiffs identified four treating physicians  
 2 as expert witnesses, but failed to provide an adequate disclosure of their opinions. The  
 3 defendants moved to strike, and Kraja resisted, arguing the failure was harmless  
 4 because he had amended his disclosures, because the court granted an extension of  
 5 the rebuttal expert deadline, and because the trial date remained far off. *Kraja*, 2016  
 6 U.S. Dist. LEXIS 54187, at \*7. The court disagreed and struck the experts, noting that  
 7 the “extension and the motion practice that followed were caused by Plaintiff’s  
 8 defective disclosures,” and going on to reason that “Plaintiff should not be able to  
 9 benefit from the extension caused by his failure to comply with the Federal Rules of  
 10 Civil Procedure.” *Id.* at \*8. The court next explained that “rather than establish that  
 11 Plaintiff’s conduct was harmless, the necessity of this extension demonstrates that  
 12 Plaintiff’s disclosures undermined the Court’s ability to manage its docket and delayed  
 13 the expeditious resolution of this case.” *Id.* Finally, it concluded that the defendants  
 14 had been prejudiced because they were entitled to information about plaintiff’s  
 15 experts on the schedule set by the court, and because as a result of Kraja’s inadequate  
 16 disclosures they “were deprived of the benefit to which they were entitled under Rule  
 17 26(a)(2)(C).” *Id.* at \*8-9.

18       Likewise, here, Plaintiffs were “deprived of the benefit to which they were  
 19 entitled under Rule 26(a)(2)(C);” i.e., timely disclosure of Defendants’ expert opinions.  
 20 Briefing on class certification has closed, and re-opening Dr. Mitmesser’s deposition  
 21 so Plaintiffs can make inquiries they could have made—absent Defendants’ failure—  
 22 would disrupt that process, resulting in considerable delay and additional prejudice.  
 23 Clearly, Defendants’ failure was not harmless.

24 **III. CONCLUSION**

25       For the foregoing reasons, Dr. Mitmesser’s declaration and testimony should  
 26 be stricken.

1 Dated: February 3, 2017

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3 /s/ Patricia N. Syverson

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## **CERTIFICATE OF SERVICE**

I hereby certify that on February 3, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail notice list, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice list.

I certify under penalty of perjury under the laws of the United States of America  
that the foregoing is true and correct.

Executed the 3rd day of February 2017.

/s/ Patricia N. Syverson

Patricia N. Syverson